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ABSTRACT

Recent legislation and court decisions have upheld the right of every child to a quality education. Public Law 94-142, The Education for All Handicapped Children Act, requires that all states provide an appropriate education for all handicapped children. Given that special education is a civil right, it is inevitable that educational malpractice and special education become entwined. Three noteworthy court cases are: (1) Frederick L. v. School District of Philadelphia--involving screening tests for learning disabilities; (2) Daniel Hoffman v. New York City Schools--regarding a four-year old with a minor speech impediment who was diagnosed as mentally handicapped and never retested; and (3) Doe v. Griles--a class action suit on behalf of 113 exceptional children in the Fort Wayne, Indiana Community School District who were served by only four teachers. To implement P. L. 94-142, schools should provide evaluation services for collecting data on students, deliver full educational services (including regular class placement, appropriate programming, and safeguards), and encourage parental involvement. The special education evaluation unit should provide services related to student evaluation, program improvement, individualized curriculum planning, and recommended research studies. (GDC)

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THE ROLE OF THE EDUCATIONAL EVALUATOR IN MALPRACTICE LITIGATION: STRATAGEMS FOR CHANGE

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I. MALPRACTICE AND SPECIAL EDUCATION

Educational malpractice was discussed both theoretically and philosophically at the beginning of the decade. By the decennium's close, however, it will have doubtlessly made the quantum leap from concept to reality. It has now been established, that if a student fails to receive the proper educational services, his parents can sue the school district for damages. What is even more troublesome however, is that even if the student does receive the services and somehow fails to absorb a set amount of knowledge or meet certain minimal skill criteria, his parents may still file a malpractice suit.

Malpractice may be to the early 1980's what accountability was to the earlier part of this decade.

Special education, though a considerably older and less esoteric concept, is nonetheless just as controversial and perhaps more legally explosive than malpractice.

Special education has now become a matter of civil rights. Edward B. Fiske, writing in the New York Times[1] has pointed out that due to the combination of court involvement, parental activity and public acceptance of the notion of education for all pupils as a basic right, special education has become one of the highest priorities at the federal, state and local level.

It is estimated that there are 8 million handicapped children in the United State between the ages of 3 and 21, and that perhaps less than half of them receive adequate educational programs. Special education includes not only the handicapped but also gifted and academically talented

students. Although the figures are unsubstantiated, it is estimated that less than 10% of the over two million students who fall within this category are enrolled in special programs for the gifted and talented.

The population for whom special services need to be provided is enormous, yet until very recently very few handicapped children were served. Edwin Martin, Jr., Director of the Bureau of Education for the Handicapped (BEH) of the United States Office of Education, has described the parents of handicapped youngsters of having tended to be "embarrassed at their situation" and approaching the schools and other social agencies with a "hat in hand" posture.

With the advent of the historic 1954 Supreme Court desegregation decision (Brown vs. Topeka Board of Education), quality education became the right of every child. The civil rights movement of the late 50's and early 60's began to create spin-off effects on educators concerned with special education. Ultimately, the parents of handicapped children went to court to demand their rights predicated upon the principle that equality of educational opportunities and services applied to handicapped children as well as to the children of racial minorities.

The landmark decision within the area of special education civil rights is referred to as the "PARC Decision" (Pennsylvania Association for Retarded Children vs. The Commonwealth of Pennsylvania). It was handed down in 1971 by U.S. District Court which ordered the Commonwealth of Pennsylvania to provide a complete education for all children at public expense.

In 1972 a federal court in Washington, D.C. reaffirmed the proposition that had been established in the PARC decision (Mills vs. Board of Education) and further ruled that an individual school district's lack of funds was not an adequate excuse for failing to provide for handicapped youngsters.

Since the early 70's, virtually every state has developed laws mandating special education services for virtually all groups of handicapped youngsters. The courts have played a major role in this process, and it is estimated that more than half of the states have seen suits brought by the parents of special education youngsters.

That legislation which will ultimately have the most far-reaching impact upon the provision of education for all handicapped youngsters is The Education for All Handicapped Children Act (P.L. 94-142). This act, originally drafted in late 1975, requires all states to provide a "fair, appropriate education" for all handicapped youngsters. The deadline for implementation was last year.

Although the Act authorized the federal government to finance a portion of the excess costs associated with the education of handicapped students, many state and local education agencies have raised questions about the requirements and have pointed out the gap between required services and funds available. It is esimtated, however, that the federal government may soon be expending almost a billion dollars a year for special education programs.

Given the rapid maturation of special education as a civil right, it was inevitable that malpractice and special education should become entwined. In the sections that follow, the relationship between these areas will be examined, with a particular focus upon the relationship

and impact of educational evaluation to special education malpractice. A number of landmark pieces of litigation within the area of special education malpractice will be briefly reviewed. Six critical areas of concern related to the provision of special education services will be presented along with the potential role which educational evaluation might play in each area. Finally, specific proposals for the utilization of evaluation as a tool to aid special education will be discussed in an effort to demonstrate how their implementation might impact upon either avoiding malpractice litigation or providing the data necessary to both the plaintiffs and defendants in such actions.

II. SPECIAL EDUCATION MALPRACTICE LITIGATION

Though malpractice litigation involving special education is no longer uncommon, it is of sufficiently recent vintage as to have generated only a limited number of noteworthy cases. Three of the more important and more temporal pieces of litigation will be briefly discussed in this section.

The Frederick L. Case[2]

On June 17, 1977, a Federal Appeals Court judge ruled that the School District of Philadelphia must provide for the identification and evaluation of all students suspected of possessing a learning disability. In affirming the position of a lower court, Judge Arlin Adams stated:

> "It is possible that....many or most of....unidentified learning disabled students do not need special education services or are currently receiving adequate remedial services. However, so long as these students are unidentified and the nature and extent of their learning disabilities go unassessed, it will be impossible to know with any certainty whether the District is discharging its statutory obligation regarding these pupils."

Even though certain students may not require special education services, the Judge ruled that all students had to be at least minimally screened in order to isolate those in need.

It was estimated that the School District of Philadelphia contained approximately 8,000 learning disabled students; however, at that point in time, only 1,300 had been identified, and still fewer were receiving services. The District did not screen all pupils, but instead relied heavily upon teacher referrals to school psychologists. The result of such a haphazard process was predictably inconsistent.

The Pennsylvania School Code required that all school districts in the Commonwealth "report" all "exceptional children," develop plans for meeting their needs, and provide special classes. Specific mandates concerning identification and screening were not included in the Code at that time. Recognizing this, the Judge conceded that Philadelphia had made a legitimate effort, but that the effort fell short.

The plaintiff, Frederick L., was seeking money damages from the school district for negligence -- specifically educational malpractice. The federal court abstained on the issue of pecuniary damages in order "to allow the state court to grapple with this difficult but important issue." The School District, as a result of the appellate court decision, developed a new, considerably more systematic approach to LD screening and pupil placement.

The Daniel Hoffman Case[3]

In what ultimately was to be the first educational malpractice suit in which pecuniary damages were actually awarded, the key factor appears to be a simple system failure to retest a student tentatively diagnosed as "retarded." Daniel Hoffman was tested at age four by the New York City Public Schools. Hoffman, who had a minor speech impediment, scored one point

below the normal range on the intelligence test used, and consequently was assigned to a class for retarded children. The School District never retested him.

Fourteen years later, when the Social Security Administration, was about to cease providing survivor's benefits, his situation was contested by his mother, a widow, who claimed he was retarded. When retested, he scored within the normal range.

A malpractice suit was filed predicated upon the notion that the School District's negligence had resulted in Hoffman being denied an appropriate education. The plaintiff sought $2.5 million in damages. In 1975, a jury awarded him $750,000. which, after the School District appealed, was reduced to $500,000. in November of 1978.

Doe v. Griles[4]

In a class action suit still in court, a record $2.825 million in damages has been claimed against school district officials of the Fort Wayne (Indiana) Community School District. Attorneys for the plaintiffs, 113 profoundly retarded youngsters, have charged that the district failed to provide appropriate special educational services as required in Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Childrens Act.

The suit is predicated upon allegedly inadequate resources and an unrealistic teacher-pupil ratio. The 113 children, each of whom is to receive $25,000. were served by only four teachers -- a ratio of 1 to 28. The attorneys have contended that therapists, diagnosticians, and other specialized personnel were seldom available, and that "nothing more than babysitting" occurred.

In addition to pecuniary damages, an injunction was requested to force the School District to hire seven more teachers, thus reducing the teacher-pupil ratio to a more manageable 1 to 10.

III. EVALUATION ROLES

Though virtually every state has passed legislation requiring special services for all handicapped youngsters, the span and focus of such policy may differ considerably between jurisdictions. The major federal legislation, however, particularly P.L. 94-142 is intended to be applied consistently throughout the nation. It is this piece of legislation, therefore, which might most easily serve as a basis for generating new evaluation roles.

Six critical areas of concern have been identified within P.L. 94-142. Inherent within each is a number of evaluation roles or purposes. The list which follows has been kept more general than specific, and, as such, might easily be expanded in tailoring it to meet the exact needs of a local education agency.

Child Data Collection System

> Annual program plans for compliance with P.L. 94-142 must include in detail the policies and procedures which will or have been undertaken to insure that all children who are handicapped, and who are in need of special education and related services, are identified, located and evaluated; including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving special education and related services. The formal evaluation done at this time means evaluation, interviewing or testing procedures used selectively with an individual child.
>
> Individual education program plans for handicapped students must include written statements concerning the child's present level of functioning, annual goals, short term objectives and a schedule for determining whether the instructional objectives are being met, as well as initiation dates for special services and expected duration.

Evaluation roles associated with a child data collection system might include:

- Initial, large scale screening processes
- Follow-up testing to determine type of handicaps
- Individual pupil assessment for purposes of placement

- Accessing records to determine prior treatment, if any
- Development of individual education program (hereafter referred to as an IEP) system to control data flow
- Development of IEP intake and process forms
- A massive discrepancy evaluation to determine the differences between the intended and actual, (or an enormous number of mini-discrepancy evaluations -- one for each child served)
- A continuing process evaluation to determine if special services are flowing as intended and are reaching their targeted populations

Full Service Delivery System

In complying with P.L. 94-142, each state must have a goal, of providing full educational opportunity to all handicapped children ages birth through twenty-one. This is to insure that all handicapped children have available to them the variety of programs and services available to non-handicapped children, including art, music, industrial arts, home economics, and vocational education. Non-academic and extra curricular services and activities must be provided in such manner as is necessary to afford handicapped children an equal opportunity to participate in those services and activities. This includes athletics, health services, recreational activities, special interest groups or clubs, referrals to agencies which provide assistance to handicapped persons and employment of students.

Evaluation roles associated with a full service delivery system might include:

- Assisting in the development and clarification of objectives in each curricular area
- Evaluating each area in order to determine the extent to which the objectives were met.
- An assessment of the provision of equal opportunity in special services activities

Placement Preference

In complying with P.L. 94-142, policies and procedures must be established and maintained to assure (1) that to the maximum extent appropriate, handicapped children are educated with children who are not handicapped and (2) that special classes,separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. A continuum of various alternative placements must be established, with students placed in the least restrictive environment which can meet their educational needs.

Evaluation roles associated with placement preference might include:

- Development of a system for mainstreaming pupils and keeping track of their experiences and progress
- Providing demographic analyses necessary for projecting service and resource needs
- School feeder area planning
- Evaluation of transportation scheduling and routing
- Development of computer programs to provide continuous special education placement alternatives

Appropriate Programming

P.L. 94-142 defines appropriate education as meaning special education and related services which are provided in conformity with an individualized education program plan. Special education means specially designed instruction to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. The term includes speech pathology, audiology, occupational therapy and physical therapy if the service is not considered to be a related service. Related services means transportation and such developmental, corrective and other supportive services as are required to assist a handicapped child to benefit from special education. These include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of handicapping conditions, school social work services, cousneling services and medical services for diagnostic or evaluative purposes. The individual education program plan includes a statement of: the child's present educational levels, annual goals, short-term objectives, the tests and other information used

to gauge the child's progress to determine if instructional objectives are being met, the initiation date for special services and expected duration of the services, and the extent to which the child will be able to participate in regular education.

Evaluation roles associated with appropriate programming might include:

- Monitoring instructional services and classroom activities (in order to avoid the future evaluation of non-events)
- Determining the congruence between the special needs of the child and the services provided
- Development of a system of IEP quality control

Procedural Safeguards

P.L. 94-142 states that procedural safeguards must be provided for handicapped children and their parents with respect to provision of a free appropriate public education. This includes due process procedures for evaluation, placement, and programming and procedures to assure the confidentiality of information that is personally identifiable on a student.

Evaluation roles associated with procedural safeguards might include:

- Assessment of the stringency and flexibility of existing procedures and safeguards
- Determining the extent to which the safeguards meet state and federal guidelines with respect to both the "right to know" and confidentiality of data.
- Evaluation of the school district's provision for due process rights
- Development of a system to provide ready access to pupil data in order to speed placement and facilitate hearings

Parent Programming

In complying with P.L. 94-142, a provision must be made for participation of parents and consultation with parents, surrogate parents or guardians of handicapped children in providing full educational opportunities for those children. This includes parent involvement in educational placement and programming procedures. Parents must be provided with written notice of intent to evaluate or place a child. Parents must have the

opportunity to participate in the individual educational program planning conference held to develop the education program for their child. These rights and responsibilities for parents imply additional responsibility for educators to develop skills related to working with and training parents.

Evaluation roles associated with parent programming might include:

- The development of a system for determining the extent to which parents are aware of their entitlement
- A means to determine the degree of parental participation
- A means to determine parental satisfaction with their level and quality of involvement

IV STRATAGEMS FOR CHANGE

As the evaluation of special education services becomes increasingly systematic and sophisticated, the strategies described in this section will likely become almost commonplace. At this point in time, however, each represents a basic, yet critical approach to meeting the informati needs associated wi the rapid institutionalization of special educat services in local educa ion agencies.

A Special Education Evaluation Unit

In order to best serve the multiple needs of a larger school system with respect to the implementation of special education legislation such as PL 94-142, and, as a residual benefit, to avoid the prospect of malpractice litigation, a separate evaluation unit might well be considered. The goals and purposes of such a unit might include, but not be limited to, the following:

1. To develop a management information system which would document the population eligible for service, diagnosis, services received, supporting information (i.e., source of intake, demographic information, etc.), and clinical assessments of progress. This

would be used to enable local administration to monitor program implementation and progress and to generate such reports as may be required by state and federal laws and regulations. The status of each pupil could also be determined for any point in time.

2. To develop a longitudinal pupil data file which would, in addition to the above, contain more detailed information about the problem diagnosed, the treatment given, and the results of treatment. This file would be used in an effort to address the question of treatment effectiveness. This file would provide the capability of taking into consideration the many individual,condition and treatment variables, in an effort to identify the more effective treatment regimens, where possible, and to document program impact.
3. To provide both formative and summative evaluation services, as appropriate, to all special education programs.
4. To provide instrument development and selection service to project personnel to the end that a more consistent and sensitive array of measures can become available for individual and program evaluation purposes.
5. To conduct studies both within and across programs in the areas of staff development, parent training, parent participation, and outreach, identification, and placement practices for the purpose of documenting services rendered and identifying promising practices.
6. To provide periodic feedback of information on program implementation to program personnel, and to provide formal evaluation reports for local, state, and federal purposes.

7. To develop a Computer Managed Instruction System which will aid in the development of IEP's. (This should promote both efficiency and accurac .)

8. To organize a Special Education Consortium consisting of the school district, other provider agencies, and appropriate university personnel for the purpose of improving practices in measurement, diagnosis, and treatment.

9. To conduct such other studies, or generate such other information as may from time to time be required by local, state or federal sources.

In order to provide the evaluative services necessary to attain the previously specified goals and purposes, so that the school district's division of special education might better serve all students requiring special facilities, resources, and/or instruction, the following three dimensional organization might be considered.

1. Technical Services

   These services will result in the development and maintenance of the management information system, longitudinal pupil data file, instrumentation, technical consulting services, and report production.

2. Field Services

   This array of services is organized to meet the field informational needs of the programs/projects related to special education. It might be composed of three (3) teams designed to address five (5) areas of concern. These areas of concern may be common to several programs or may be unique to a specific program.

These areas are as follows:

Staff Development - efforts toward improving staff competencies.

Parent Training and Participation - efforts involved in developing and/or improving parent capabilities for dealing with their handicapped youngsters and thereby facilitating the involvement of parents in the education of their youngsters.

Home/Institution-based services - the provision of services in home settings and institutional and clinical settings.

Identification and Placement Services - public awareness campaigns, intake and diagnostic procedures, and placements.

School Based Services - the provision of services within the schools.

3. Administrative and Supportive Services

These services represent the evaluation management activities necessary to the operation of the unit and will provide for liaison between the evaluation and program staffs.

A Special Education Data System

Pivotal to the success of the special education evaluation unit described above is a computerized data system. Such a system would provide special education program decision makers with a means of collecting, storing, and retrieving data on all persons being served. That which follows is a two-phase prospectus for the design and implementation of such a system, developed in Philadelphia.

Phase I of this prospectus deals with the creation of a data file which will include all persons for whom an individual education program (IEP) has been created. Phase II of the project will involve maintenance activities

of the initial data file and the expansion of the Phase I data system in order to address more completely the information requirements of the state education department and to provide meaningful evaluation and monitoring data for special education program personnel and for office of research and evaluation (hereafter referred to as ORE) evaluation teams.

As long as the necessary resources are made available, this proposal should meet the needs of its intended beneficiaries and within timeframes that are reasonable.

Phase I

General Description: The present year's IEP documents will serve as the basis for the initial file creation. In this regard, special education secretaries in each district office will enter on to a specially designed input document, key data elements from each served person's IEP. ORE staff will be responsible for training the secretaries in this important activity.

This seems to be the most efficient and only reasonable way to capture the needed data elements to initialize the file. The rationale for this approach is based on the following: 1) IEP's cannot be sent directly to a key processing vendor because of confidentiality issues and the inconsistency with which the information is entered on the form(s); 2) district special education secretarial staff are in a much better position to obtain missing data and to get clarifications where needed; 3) the work load would be evenly distributed.

The completed input documents would be clerically edited by ORE staff for completeness prior to submitting them for processing.

The resulting machine readable file will be computer edited and, in addition, interfaced with the school district's pupil directory system and other related pupil data systems to obtain those key data

elements which are not included on the IEP (e.g., pupil ID number, race, sex and Limited English Speaking Ability [LESA]). All error conditions recognized in the computer processing will be given to ORE staff for reconciliation and re-entry into the system.

The final tape file will contain the basic data elements of all persons for whom an IEP has been created. This file will be available to produce school district, state and federal reports and to provide the office of special education with a data resource which can be used to answer basic questions concerning the persons being served.

Data Elements: For each person served, the following data will be collected, stored and maintained: Name, home address, birthdate, sex, race, school of attendance and district, type of location if not a public school (e.g., private school, private residential school, state center, etc.), primary exceptionality, educational assignment (i.e., regular class or separate class), amount of time in special education, instructional level and special mode of communication (e.g., LESA, Manual, Braille, etc.).

Responsibilities: The office of research and evaluation will be responsible for working with the offices of special education, data processing and records management in the design of a data system that will meet the needs of special education and the school district's reporting responsibilities. This will involve the planning, collection, editing and input of all the required data and the file management of the special education data system.

The special education office will be responsible for assigning a key staff person to work with ORE staff in the design of the system to ensure that its needs are met to the fullest extent possible. The special education office will also provide district office secretarial

support particularly with regard to the data needed to initialize the system. Finally, special education will be responsible for providing additional staff and budgetary resources where needed to support the management of the system.

The office of data processing will be responsible for the technical computer system design and all related computer applications for the creation, maintenance and expansion of the special education data system.

The office of records management will be responsible for assisting in the design of the documents needed to collect and maintain the data elements of the system and to assume complete responsibility for their procurement.

Phase II

General Description: This phase deals with two separate but closely related projects. It is concerned with the expansion of the system to accommodate the additional data elements identified by the state's department of education; those which special education may need to meet its responsibilities and those needed by ORE in its evaluation responsibilities. It is also concerned with the maintenance of the basic data set as dictated by changes in the IEP's for the next school year.

The data collection activities would be accomplished using computer generated machine readable documents, one for each person on the special education data system file. Since Phase II would depend heavily upon the ultimate form taken by the yet to be finalized state wide data collection system, specific data elements cannot yet be described. The developmental responsibilities would not differ markedly from those detailed in Phase I.

Resources and Timing

Resources and timing will vary according to the size of the school district, the potential special education population to be served, and the level of existing available technical expertise in areas such as research management and data processing. For the two phase operation described here, it is estimated that, with the necessary additional resources being made available from the start, Phase I could be completed within nine months, while the expansion of the system called for in Phase II would take an additional eighteen months.

V. CONCLUSIONS

Rather than diminishing in complexity, malpractice litigation related to special education is growing ever more involved. Most recently, the minimal competency testing movement has collided with the national special education emphasis. The result, as might be predicted, has been confusing and disarray.

At the crux of the problem is the unanswered question of "what happens if the goals set out in the IEP are different from standards tested in a minimum competency testing program, and passing the competency test is a prerequisite for a regular high school diploma?"[5] Since P.L. 94-142 guarantees certain rights of due process, it would seem to be incumbent upon the school district to develop a process to resolve disagreements with parents concerning which competencies are most appropriate for their children. Furthermore, Section 504 of the Rehabilitation Act of 1973, which prohibits pupils from being excluded from educational programs by virtue of a handicap, would seem to require competency testing for special education children. It would seem, however, that the competencies would need to be individually tailored to accommodate the pupils' special needs.

Ayala v. the Philadelphia Board of Education, saw the doctrine of governmental immunity abolished in the Commonwealth of Pennsylvania.[6] The court stated that "the doctrine of governmental immunity -- long since devoid of any valid justification -- is abolished in this commonwealth. In so doing, ... we join the ever increasing number of jurisdictions which have judicially abandoned this antiquated doctrine." Decisions like Ayala foreshadowed the advent of educational malpractice litigation. Though most states have abolished governmental immunity, educational malpractice is far from having become a commonly accepted precedent.

One of the most common arguments against the validity of educational malpractice is that once such a notion becomes acceptable, the flood of litigation that will follow would both choke the courts and paralyze the schools. In response to this argument, a dissenting judge in the Donohue v. Copiague Union Free School District case stated that "there is no reason to differentiate between educational malpractice on the one hand and other forms of negligence and malpractice litigation which currently congests our courts."[7]

To still further cloud the future of educational malpractice, a bill was introduced into the Pennsylvania Senate,[8] signed by the Governor, and became law on January 21, 1979, which resurrected the concept of sovereign immunity,

> To be Known as the Political Subdivision Tort Claims Act,[9] this bill professes to generally reinstate the concept of governmental immunity for political subdivisions, including school districts; also protects employees from tort liability during the course of employment; however, also provides that this change is subject to a number of exceptions, including cases for damages resulting from operation of motor vehicles, and from ownership, possession or control of real estate and sidewalks.

Depending upon the ultimate legal interpretation of this Act, the basic notion of educational malpractice could conceivably become moot.

No matter what the future holds for educational malpractice litigation, it may have served as a critical catalyst in the area of special education evaluation. The role of evaluation is to provide information for decision making, and the better and more timely the information provided, the greater the potential for better serving the educational needs of special students.

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